95-1174

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HYUNDAI MERCHANT MARINE CO., LTD., POHANG IRON AND STEEL CO., LTD., THE ORIENTAL FIRE & MARINE INSURANCE CO., LTD., THE SHIN DONG-A FIRE & MARINE INSURANCE CO., LTD., DAEHAN FIRE, MARINE INSURANCE CO., LTD., INTERNATIONAL FIRE & MARINE INSURANCE CO., LTD., KORYO FIRE & MARINE INSURANCE CO., LTD., FIRST FIRE & MARINE INSURANCE CO., LTD., HAEDONG FIRE & MARINE INSURANCE CO., LTD., THE ANKUK FIRE & MARINE INSURANCE CO., LTD., HYUNDAI MARINE & FIRE INSURANCE CO., LTD., LUCKY INSURANCE CO., LTD., KOREA AUTOMOBILE FIRE & MARINE INSURANCE CO., LTD.,

Petitioners,

—against—

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a statute drafted by the executive branch and included within a lengthy appropriations bill, which retroactively abolished longstanding federal subject matter jurisdiction over exactly one suit pending against the United States, thereby deciding the suit in the Government's favor, and which was enacted without prior notice to the District Court or to the plaintiffs in that action, unconstitutionally violated the separation of powers and denied plaintiffs due process of law?

RULE 29.6 STATEMENT

Petitioners herein are limited liability companies that have no parents, subsidiaries or affiliated companies that have issued shares to the public.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for

the Second Circuit in this case, which involves an important question of federal law that has not been, but should be, settled by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals of which review is sought (1a)[1] was decided and entered on January 26, 1996. It is reported at 75 F.3d 134 (2d Cir. 1996). The opinion of the District Court (4a) is reported at 888 F. Supp. 543 (S.D.N.Y. 1995).

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1996. A petition for a writ of certiorari is due on April 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED

This case involves 10 U.S.C. § 2798 (1996), which provides in pertinent part:

> (a) CLAIMS BARRED. No civil action may be brought against the United States on the basis of the content of a navigational aid prepared or disseminated by the Defense Mapping Agency.
>
> (b) NAVIGATIONAL AIDS COVERED. Subsection (a) applies with respect to a navigational aid in the form of a map, a chart, or a publication and any other form or medium of product or information in which the Defense Mapping Agency prepares or disseminates navigational aids.

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[1] References to the Appendix hereto are cited as "__a". References to the Joint Appendix in the Court of Appeals are cited as "JA___".

Section 1074(d) of Pub.L. 103-337 provided:

> (d) EFFECTIVE DATE. Section 2798 of title 10, United States Code, as added by subsection (b), shall take effect on the date of the enactment of this Act and shall apply with respect to (1) civil actions brought before such date that are pending adjudication on such date, and (2) civil actions brought on or after such date.

STATEMENT OF THE CASE

This is an action against the United States under the Suits in Admiralty Act ("SIAA"), 46 U.S.C. App. §§ 741-752 (1995), seeking damages of more than $40 Million for the grounding and total loss of the ship Hyundai New World and her cargo.[2] Petitioners allege that the grounding resulted from the negligent failure of the Defense Mapping Agency ("DMA")[3] to notify mariners of material information received subsequent to the DMA's publication in 1983 of a chart of

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[2] Section 742 of the SIAA, enacted in 1920, provides in pertinent part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . . .

46 U.S.C. § 742 (1975).

[3] The DMA is the United States government agency responsible for publishing charts of foreign waters and correcting those charts through weekly Notices to Mariners. The DMA performs these functions pursuant to 10 U.S.C. § 2791, which states:

> The Defense Mapping Agency is an agency of the Department of Defense. The Defense Mapping Agency *shall* improve means of navigating vessels of the Navy *and the merchant marine* by providing, under the authority of the Secretary of Defense, accurate and inexpensive nautical charts, sailing directions, books on navigation, and manuals of instructions for the use of all vessels of the United States *and of navigators generally*. (Emphasis added.)

Brazilian waters. The grounding occurred in 1987, while the ship was navigating with the assistance of the DMA chart and all published DMA notices to mariners. Prior to the grounding, the DMA had received reports of a 1984 survey and other information which stated that water depths shown on the DMA's 1983 chart in the vicinity where the vessel grounded were not accurate. The DMA, however, failed to issue a notice to mariners or otherwise to warn mariners about the danger of using its 1983 chart to navigate in that area. (6a-7a).

Petitioners commenced suit against the United States in 1989. The Government resisted Petitioners' efforts to obtain discovery and was twice sanctioned by the District Court for abuse of the discovery process. (JA107-108). On July 23, 1993, the Government moved to dismiss for lack of subject matter jurisdiction, claiming the SIAA to be inapplicable to Petitioners' claims. (JA109). The District Court denied the Government's motion on September 26, 1994. (JA249).

On April 22, 1994, while the Government's motion to dismiss was pending before the District Court, the Department of Defense ("DOD") transmitted its 1995 appropriations bill to the Senate Armed Services Committee. (JA368). Included within the bill was a provision barring suits based on DMA publications:

> No claim or action may be brought against the United States based upon the preparation or dissemination by the Defense Mapping Agency of any navigational aid, including but not limited to, maps, charts, publications, products or information, regardless of the form or medium of such aids. (JA374-375)

A section of the DOD's cover letter to the Senate Committee accompanying the appropriations bill explained the Department's request for the above-quoted provision[4]:

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[4] The District Court incorrectly attributed this letter to Senator Nunn. (8a).

> DMA relies heavily upon nautical and aeronautical products and information of other countries. A tremendous quantity of information is processed in preparing and distributing thousands of maps and charts and related information. DMA exercises great care to ensure the accuracy of all its products. Since DMA cannot independently verify all the information supplied by foreign sources it is unreasonable to subject the United States to unlimited liability in the production and distribution of these many products.
>
> For example, in the case of *Hyundai Merchant Marine Co., Ltd. et. al. v. United States*, the HYUNDAI NEW WORLD, a 200,000 deadweight ton bulk cargo carrier, stranded in the Bay of Sao Marcos, Brazil, on 31 March 1987, resulting in a total loss of ship and cargo. The ship owner, cargo owners and underwriters of same sued the United States for negligence alleging that the navigators of HYUNDAI NEW WORLD were using DMA chart 2471 (A DMA facsimile of a Brazilian chart) containing errors and omissions which were the cause of the stranding. The potential damages to date are estimated at $60 million.
>
> This proposed statutory language would make it clear that the activities of the Defense Mapping Agency in the preparation and production of maps, charts, aids to navigation, publications, products and information, in whatever form, primarily for the use of U.S. warfighters, are expressly exempt from any claim or cause of action. (JA371).

The instant action was the only case cited by the DOD in its request to Congress for legislation barring claims based on DMA navigational aids.

As reported out of the Senate Armed Services Committee, the defense appropriations bill contained the language that was to be enacted into law:

> (a) CLAIMS BARRED.—No civil action may be brought against the United States on the basis of the content of a navigational aid prepared or disseminated by the Defense Mapping Agency. (JA378).

The bill included a provision for its retroactive application to civil actions brought before the date of enactment. (JA379). The bill was passed by both Houses without change and was signed into law on October 5, 1994. It has been codified as 10 U.S.C. § 2798.

While the appropriations bill was working its way through Congress, the District Judge was preparing an opinion denying the Government's motion to dismiss under existing law.[5] (JA249). The Government did not advise the Court or the Petitioners that the DOD had submitted to Congress proposed legislation, which, if applied retroactively, would withdraw subject matter jurisdiction from the Court. Furthermore, there apparently were no press reports about the proposed legislation, as a search in Nexis by Petitioners' counsel revealed none.

On November 7, 1994, the Government moved to dismiss on grounds that Section 2798 deprived the court of subject matter jurisdiction over Petitioners' claims. (JA262). After quashing Petitioners' discovery regarding the enactment of the statute, 159 F.R.D. 424 (1995), the Court granted the Government's motion to dismiss. (4a). The Court of Appeals affirmed on January 26, 1996. (1a)

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law that should be decided by this Court—whether Congress, at the request of the executive branch, may pass retroactive legislation to obtain dismissal of a specific case pending against

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[5] The District Court's Opinion Order denying the Government's motion to dismiss was issued on September 26, 1994. (JA249).

the Government, thereby deciding that case in the Government's favor. At the heart of this Petition are fundamental considerations of the judiciary's independence in this country's tripartite system of government and the role of due process as a safeguard against unfair, "stealth legislation" intended to terminate otherwise valid pending suits against the Government without notice to the plaintiffs.

Petitioners' cause of action arose under the Suits in Admiralty Act, 46 U.S.C. App. §§ 741-752.[6] After participating in the litigation for more than five years, the Government resorted to a clandestine effort to legislate an end to the suit. Buried in the 1995 defense appropriations bill was a provision revoking the Government's waiver of sovereign immunity with respect to claims against the DMA. The provision was kept secret from Petitioners and the District Court, and it was routinely enacted, together with a provision for retroactivity, as part of the annual defense appropriation without debate, opposition, or publicity, to Petitioners' knowledge.

In the DOD's letter to Congress transmitting the defense appropriations bill, the DOD cited this case as its one and only example of litigation that would be precluded by Section 2798. Since there were no other cases pending involving claims against the DMA, the legislation must have been conceived for the purpose of resolving this action in favor of the Government.

Petitioners do not challenge the prospective application of the statute. Congress undoubtedly has the power to withdraw the Government's waiver of immunity as to cases that have not yet been filed. Congress may not, however, enact a retroactive law to obtain the dismissal of a specific case pending in federal court pursuant to a statutory waiver of sovereign immunity. To hold otherwise, as the Court of

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[6] The SIAA was enacted to waive the Government's sovereign immunity in maritime cases under circumstances where a private party would be liable.

Appeals did here, would allow the Government to decide litigation in its own favor, without affording the plaintiff notice or an opportunity to participate in that decision. This Court should grant certiorari to determine whether such an infringement on the power of the judiciary is an unconstitutional violation of the separation of powers and denies Petitioners due process of law.

I. The Petition Should be Granted to Establish that When Sued, the United States Must Allow the Judicial Branch to Determine the Outcome of the Litigation.

The separation of powers among the judicial, executive and legislative branches of government is a fundamental tenet of our legal system. This Court "has repeatedly 'given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.' " *Johnston v. Cigna Corp.*, 14 F.3d 486, 494 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1792 (1995), *quoting from Mistretta v. United States*, 488 U.S 361, 380 (1989). Under our system, the legislature enacts laws of general application and the courts decide particular cases. "Where acts of the Legislative Branch prevent the Judicial Branch from accomplishing its constitutionally assigned functions, Congress 'pass[es] over the limit which separates the legislative from the judicial power.' " *Rabin v. Fivzar Associates*, 801 F. Supp. 1045, 1052 (S.D.N.Y. 1992), *quoting from United States v. Sioux Nation of Indians*, 448 U.S. 371, 391 (1980).

In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), this Court held that Congress had unconstitutionally violated the separation of powers when it passed a law which required a decision favorable to the Government in a pending case against the Government. The case concerned a claimant who had sued the United States in the Court of Claims to recover

proceeds from the sale of property confiscated during the Civil War. The law at the time allowed such a claim for property owners who could prove that they had never aided the Confederacy and were loyal to the United States. A claimant could meet his burden of proof by showing that he had received a Presidential pardon. While the claim was pending, however, Congress passed a law which provided that a Presidential pardon was inadmissible as evidence demonstrating loyalty and that in any such case the Supreme Court must dismiss an appeal from the Court of Claims for want of jurisdiction.

This Court held the statute to be unconstitutional, reasoning:

> What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this Court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of the pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the Legislature may prescribe rules of decision to the Judicial Department of the Government in cases pending before it?
>
> We think not . . . .
>
> * * *
>
> We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

80 U.S. (13 Wall.) at 146-147.

In *United States v. Sioux Nation of Indians*, this Court stated that the statute ruled upon in *Klein* was unconstitutional because "it prescribed a rule of decision in a case pending

before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." 448 U.S. at 404. The separation of powers principle established by *Klein* remains an important principle of constitutional law. *See, e.g., Robertson v. Seattle Audubon Society*, 503 U.S. 429, 118 L.Ed.2d 73, 86 (1992).

In passively rubber stamping the DOD's statute, Congress established a rule of decision in this case requiring a judgment in the Government's favor. Section 2798 was targeted solely at eliminating Petitioners' cause of action. There was no other pending litigation against the United States based on a claim that the DMA was negligent in maintaining its nautical charts and publications, and Petitioners' suit was the only case mentioned in the DOD's transmittal letter. It is difficult to conceive of a clearer instance of Congress affecting the rule of decision in pending litigation to require a decision in the Government's favor.

The Petition should be granted so that this Court may delineate the constitutional obligation of the executive and legislative branches to allow the judicial branch to determine the outcome of suits against the Government pending in the federal courts. Under the decision below, the executive branch may insert legislation retroactively withdrawing jurisdiction from the courts over a specific case in a voluminous but innocuous bill without notifying the plaintiff or the district court in which the case is pending. When the bill is passed routinely, without careful analysis or debate, and signed into law, the case must be dismissed.

Unless this Court grants the instant Petition, anyone who sues the Government will be obliged not only to employ an attorney, but, in addition, a professional lobbyist, to review all bills submitted by the executive branch to Congress for a provision withdrawing jurisdiction over the suit from the courts. Moreover, in today's complex legislative environment, Congress cannot be expected to identify and delete such

improper provisions from proposed legislation. As this case demonstrates, it is relatively easy for a Government agency to conceal a retroactive provision to terminate a bothersome lawsuit within a lengthy but otherwise uncontroversial appropriations bill and have it enacted without notice or debate, thereby insuring that a litigant would be unaware of the proposed statute until after it had become law. This Court should grant the Petition to determine the constitutionality of such actions and to delineate the limits of the executive and legislative branches' power to decide cases pending before the judicial branch by withdrawing a federal court's subject matter jurisdiction over such cases.

II. The Court of Appeals' Decision that Petitioners' Perfected Cause of Action Against the Government May Be Extinguished by Congress Is Contrary to Prior Decisions of This Court.

This Court has long held that a legislature may not extinguish a vested property right without due process of law. *Pritchard v. Norton*, 106 U.S. (16 Otto) 124 (1882). A perfected cause of action has been held to be a protected vested right. *Ettor v. Tacoma*, 228 U.S. 148 (1913). In *Ettor*, plaintiffs filed suit against the City of Tacoma for consequential damages to real property as a result of street grading. A state statute existing at the time of injury waived sovereign immunity for damages resulting from such grading, and plaintiffs accordingly sued the City in state court pursuant to the statute. While the case was being heard, the state legislature amended the statute to remove the waiver of immunity, and the state court consequently dismissed the action. This Court reversed, expressly holding plaintiffs' right to compensation under the original statute to be "a vested property right" which could not constitutionally be legislated away without due process of law, even though the case had not reached final judgment when the right of action was repealed. 228 U.S. at 158.

Ettor is indistinguishable in any meaningful respect from the present action. In both cases, a government caused injury to plaintiffs, who had a right to sue the government for damages under a previously existing statute that waived sovereign immunity. In both cases, the suit had reached an advanced stage of litigation, but not final judgment, when legislation repealing the right of action was enacted. *Ettor*, therefore, compels the conclusion that Section 2798 is unconstitutional as applied in this case.

The same principle applied in *Ettor* has been the basis for other rulings by this Court invalidating the retroactive application of statutes that sought to extinguish pending actions for damages. *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922); *Pacific Mail Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450 (1864); *see also Coombes v. Getz*, 285 U.S. 434 (1932).

This Court's decision in *Ettor* is in accord with principles of international law upheld by the European Court of Human Rights in *Pressos Compania Naviera S.A. v. Belgium*, Case 38/1994/485/567 (Nov. 20, 1995). That case involved a Belgian law which retroactively extinguished the plaintiffs' right of action:

> ". . . the 1988 Act quite simply extinguished, with retrospective effect going back thirty years and without compensation, claims for very high damages that the victims of pilot accidents could have pursued against the Belgian State or against the private companies concerned, and in some cases even in proceedings that were already pending."[7]

Pressos Compania Naviera S.A. v. Belgium at ¶ 39.

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[7] The official version of *Pressos Compania Naviera S.A. v. Belgium* has not yet been published, but is expected to become available about one month from now. The quotations from the Judgment are taken from an unofficial report published in *European Transport Law* [1996] at 71-90.

The court found that the Belgian statute breached Article 1 of the First Protocol to the European Convention on Human Rights, which is essentially an international equivalent to the Due Process Clause. The court concluded: "Such a fundamental interference with the applicants' rights is inconsistent with preserving a fair balance between the interests at stake." *Pressos* at ¶ 43.

In this case, Petitioners brought suit pursuant to the SIAA, a longstanding statute that waives the Government's immunity with respect to such actions. Petitioners diligently prosecuted their claims for more than five years in reliance on the statutory waiver, and prevailed against the Government's prior motion to dismiss. Facing a trial on the merits under existing law, the Government secretly arranged for enactment of a retroactive statute to extinguish Petitioners' cause of action. This Court should grant certiorari to determine whether Petitioners had a vested property right in their cause of action against the Government which may not be legislated out of existence.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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